

Home > Businesses > Help & Resources > Legal Library > Letter Rulings > Letter Rulings - By Year(s) > (2000-2004) Rulings >

Letter Ruling 00-7: Sales Tax Treatment of Transactions that Relate to Communications Towers

March 24, 2000

You have requested a letter ruling concerning whether certain transactions pertaining to real estate are subject to the sales and use tax. We conclude that they are not, as discussed more fully below.

Facts

1. Background

***** (the "Buyer"), a Delaware corporation, owns communications towers located throughout the United States. For a monthly fee, the Buyer grants wireless communications companies the right to attach their equipment to the towers. These site usage agreements generally range in duration from three to five years.^[1] The Buyer is not a communications company and does not render communication services.

The Sellers provide wireless communications services to their customers.^[2] In order to render these services, the Sellers and other providers own and operate communications equipment (a "Communications System"), consisting of ground-based radio frequency transmission and reception equipment connected by coaxial cable to antennas mounted on the towers. The ground based equipment is housed inside buildings located at the tower sites.

The towers on which the Sellers' equipment is located are steel structures averaging 171 feet in height (with some exceeding 400 feet in height). The equipment buildings range in size from approximately 8' x 10' to 20' x 40'. Most of the buildings are constructed of brick, concrete block, or wood/metal with siding and were built on-site. All of the buildings are equipped with electric and telephone service, and are climate controlled. The buildings are used to house the transmission portion of a Communications System that consists of a transmitter and a receiver and associated antenna, which is installed upon the tower. This equipment is all powered by electricity and often has battery back up capabilities or an on site generator system for emergency purposes.

The above-referenced towers may be constructed only after licenses, permits and approvals are obtained from the Federal Aviation Administration and from local zoning boards and building commissions. These processes generally take from several months to several years to complete. When construction finally begins, a concrete foundation (the "pad") is poured and dried, and steel spikes or plates are embedded in it. The tower is then constructed on the pad from the ground up, with the base bolted to the embedded steel spikes or plate. Generally, a substantial amount of land

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is required in order to construct a tower because guy wires are necessary to secure the tower to the land. Once constructed, it is expected that a tower will remain indefinitely.

Prior to the transaction described below, the Sellers owned communications towers and the equipment buildings at tower sites in over twenty states. Sellers owned the land at approximately 40 percent of the tower sites and entered into ground leases (the "Ground Leases") at the remainder of the tower sites. Some of the leases are long term arrangements, but most have 5 to 10 year terms, with options for the lessee to renew for one or two additional terms. Other leases permit the lessee to enter into month to-month or year to year arrangements once the initial term expires. Although the leases generally provide that the towers are subject to removal at the end of the lease term, for the following reasons, it is the Buyer's intention that the towers will remain indefinitely:

- (a) It takes approximately 7 to 10 days to remove a tower. Removing the tower requires deconstructing the tower in a process that mirrors constructing the tower, and costs between \$30,000 and \$50,000.
- (b) The Federal Communications Commission ("FCC") generally licenses transmitters only for a specific location. Thus, in order to remove a tower and construct a new one elsewhere (even 100 feet away), each transmitter located at that tower site may need to be relicensed by the FCC. The FCC does not provide expedited approval for relicensing transmitters that must be moved because the tower site has moved; thus, the process of obtaining a license for a new site would take three months to three years to complete.
- (c) Each wireless communications company develops a Network Plan whereby communications equipment is strategically placed at tower sites in order to provide adequate signal coverage throughout a specific geographic area. Removal of this equipment from a tower site would not only be costly, but could require the revision of the Network Plan to avoid gaps in signal coverage.
- (d) It is now extremely difficult to obtain zoning approval to construct a tower in most communities in the United States. The process can take from six months to two years. In many communities, new towers can no longer be built; however, existing towers are generally grandfathered.
- (e) Many of the Ground Leases require that the property be restored to its original condition when the lease has been terminated. This process, which is both time consuming and expensive, would not only include removing the towers and equipment buildings from the site, but would also require the removal of the concrete foundations to which these assets are securely connected.

In addition to using the towers in the communications business, the Sellers have entered into site usage agreements with other communications companies to permit such parties a nonexclusive right to attach their antennas to the towers and place transmitters and receivers in the equipment buildings for a monthly fee. The agreements also generally grant these companies the right to enter the premises to install, remove, repair, or maintain any communications equipment placed on the towers or in the equipment buildings. There are typically several site usage agreements at each tower site.

2. The Transaction

On September 3, 1998, the Buyer purchased the following assets from the Sellers:

- (a) substantially all of the Sellers' tower site assets (i.e., communications towers and equipment

buildings);[\[3\]](#)

- (b) land;
- (c) each interest as tenant in and to the Ground Leases; and
- (d) each interest as grantor in and to the site usage agreements.

On the same date, the Buyer entered into site usage agreements with the Seller at those sites where the Sellers currently have communications systems and other related equipment in place. The initial term of these agreements is fifteen years. In accordance with standard industry practice, the Sellers are granted a nonexclusive right of access to the premises twenty four hours a day, 365 days a year for its employees, agents, contractors or representatives to install, remove, repair, or maintain any communications equipment attached to the towers or located in the equipment shelters. The Sellers maintain ownership of the equipment. Sellers do not, however, have possession or control over the towers. The Buyer is now responsible for maintaining the towers and the sites.

3. Post transaction

After the transaction, the Buyer will collect monthly payments from three sources. These three sources are: (1) customers permitted to place their equipment at the tower sites pursuant to the site usage agreements Buyer assumed; (2) the Sellers, pursuant to the site usage agreement entered into on the transaction date; and (3) new customers with whom the Buyer enters into site usage agreements.

Questions

Your ruling request raises the following two questions:

- (1) For sales and use tax purposes, are the communications towers and the equipment buildings considered real property or tangible personal property when these assets are affixed to real estate: (a) that the Buyer has purchased; and (b) where the Buyer has assumed an underlying Ground Lease?
- (2) If the assets at the tower sites are considered real property, will payments received for the right to attach equipment to the towers and equipment buildings be subject to sales or use tax?

Discussion

In general, the sales tax applies to the sale of tangible personal property. See G.L. c. 64H, § 1, 2. The sale of real estate is not subject to sales tax, but rather is generally subject to the deeds excise. See G.L. 64D, § 1. The charge for a right to attach property to a pole or similar structure is typically not the taxable sale of tangible personal property. See LR 84-56.

Real estate is subject to local property tax. See c. 59, § 2A(a). Chapter 59, § 2A(a) provides that “[r]eal property for the purpose of taxation shall include all land within the commonwealth and all buildings and other things erected thereon or affixed thereto, unless otherwise exempted from taxation under other provisions of law.”

The Supreme Judicial Court has stated that “[l]and and the buildings erected thereon or affixed thereto are property taxed as a unit and this rule is not affected by private agreements or by the degree of physical attachment to the land.” *Board of Assessors of Wilmington v. Avco Corp.*, 357 Mass. 704, 706 (1970). Pursuant to this rule, an agreement between a landlord and tenant concerning ownership of the erected buildings or other property does not affect the tax treatment. For example, in *Milligan v. Drury*, the Court considered the situation in which a tenant possessed the right at the end of a lease to remove buildings resting on timbers laid on top of the ground. 130 Mass. 428 (1881). The Court concluded that the board of assessors could lawfully assess the buildings as real estate, notwithstanding the terms of the private contract between the parties.

In *Avco*, the Court concluded that three 400-foot towers installed upon a lessor’s property were real estate subject to the local property tax. 357 Mass. at 705-706. The Court noted that each of the towers rested upon a concrete foundation braced by guy wires, which were removably attached to concrete anchors buried in the ground. *Id.* at 706. In addition, one of the towers was bolted to its foundation while the other two towers were removably engaged to their foundations. *Id.* See also *Westinghouse Broadcasting Co., Inc. v. Township of Lyndhurst*, 358 A.2d 203 (1976) (reaching a result similar to *Avco* on similar facts).

Conclusion

We conclude that, for purposes of this ruling, the communications towers and the equipment buildings are considered real property. Consequently, the sale of the communications towers and equipment buildings are not subject to sales or use tax. In addition, we conclude that, the payments for the right to attach equipment to the communications towers and the equipment buildings are not subject to the sales or use tax because the payments are for real property.

Very truly yours,

/s/Frederick A. Laskey

Frederick A. Laskey
Commissioner of Revenue

FAL:DMS:mtf

LR 00-7

[1] The site usage agreements are also commonly known in the industry as leasing arrangements.

[2] The Sellers were ***** its wholly owned subsidiary,
and the direct and indirect wholly owned subsidiaries of

[3] Two of the tower sites involved in this transaction are located in Massachusetts.